87-893

Supreme Court, U.S.
FILED
NOV 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ALSTON A. EMANUEL,

Petitioner,

v.

JOHN O. MARSH, JR., Secretary of the Army, in his official capacity; DEPARTMENT OF THE ARMY, JQ U.S. ARMY TROOP SUPPORT AND AVIATION MATERIEL READINESS COMMAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EDWARD L. WELCH
216 North Main Street
P.O. Box 93
Edwardsville, IL 62025
(618) 656-4744; 271-3510

Attorney for Petitioner

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

OCTOBER TERM, 1987

_____

ALSTON A. EMANUEL,

Petitioner,

v.

JOHN O. MARSH, JR., Secretary of the Army, in his official capacity; DEPARTMENT OF THE ARMY, JQ U.S. ARMY TROOP SUPPORT AND AVIATION MATERIEL READINESS COMMAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EDWARD L. WELCH
216 North Main Street
P.O. Box 93
Edwardsville, IL 62025
(618) 656-4744; 271-3510

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Where purely subjective criteria are used to make promotions may the disparate impact mode be used to determine if unlawful discrimination has occurred?

PARTIES TO THIS PROCEEDING

There are no subsidiary parties to this Petition for Writ of Certiorari who are not listed in the style of this cause.

TABLE OF CONTENTS

	PAGE
Table of Authorities.....	iv
Decision Below.....	1
Jurisdiction.....	2
Statement of Case.....	3
Reasons for Granting Writ.....	17
Specific Practices of Agency.....	22
Conclusion.....	30
Appendix.....	
Decision and Order of the U.S. Court of Appeals for the Eighth Circuit.....	A-1

TABLE OF AUTHORITIES

PAGE

CASES:

Antonio v. Wards Cove Packing Co., 810 F.2d 1477, 43 FEP Cases 130 (9th Cir. en banc 1987)..... 20

Dothard v. Rawlinson, 433 U.S. 321, 15 FEP Cases 10 (1977)..... 18

Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985)..... 26

Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971).....17,18

Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985)..... 20

Hill v. Seaboard Coast Line Railroad Company, 767 F.2d 771 (11th Cir. 1985)..... 19

Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982)..... 25

Regner v. Chicago, 789 F.2d 534 (7th Cir. 1986)..... 19

Teal v. State of Connecticut, 457 U.S. 440, 29 FEP Cases 1 (1982). 18

Watson v. Fort Worth Bank & Trust, 798 F.2d 91 (5th Cir. 1986) cert. granted in part, 107 S.Ct. 3227 (1987)..... 21

DECISION BELOW

This is a petition addressed to the sound discretion of this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit dated September 2, 1987, which judgment affirmed that of the United States District Court for the Eastern District of Missouri dated January 31, 1986, which held in part that the disparate impact analysis could not be applied to subjective employment practices.

JURISDICTION

The jurisdiction of the Court below was pursuant to 28 U.S.C., §1291. The September 2, 1987 opinion of that Court is included in the Appendix hereto.

This Court has jurisdiction to review the September 2, 1987 Order of the Eighth Circuit Court of Appeals pursuant to 28 U.S.C., §1254.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ALSTON A. EMANUEL

Petitioner,

vs.

JOHN O. MARSH, JR., Secretary of the Army, in his official capacity; DEPARTMENT OF THE ARMY, JQ U.S. ARMY TROOP SUPPORT AND AVIATION MATERIAL READINESS COMMAND,

Respondents.

STATEMENT OF CASE

Petitioner Emanuel contends that he was discriminated against because of his race when he was not selected for a promotion to the position of Supervisory Packaging Specialist, GS-2032-13, on May 5, 1980.

John Snyder, a white male, was selected by the then Lieutenant Colonel Straeb (a white male now retired) for the position in question rather than the peti-

tioner.

Both the petitioner and Mr. Snyder were civilian employees of the U.S. Army who had spent virtually their entire working careers as packaging specialists. Prior to the selection in question both had worked as Packaging Specialists GS-2032-12, and based upon their past records and the positions occupied by them appeared to be highly qualified.

On September 14, 1975, petitioner and Mr. Snyder were competitors for the position Packaging Specialist, GS-2032-12 and Mr. Snyder was selected for such position rather than the petitioner. On November 12, 1975, the petitioner filed a formal complaint of discrimination based upon his race as a result of his non-selection for the position of GS-2032-12.

The U.S. Army Civilian Appellate Review Agency (hereinafter referred to as USA-CARA) was delegated the responsibility of

investigating civilian employees' EEO complaints against the Army and that Agency conducted such a review of the petitioner's November 12, 1975 complaint of discrimination.

The investigative report by USACARA of petitioner's complaint is dated January 6, 1976, and that report contains a detailed statement and analysis of the statistical environment at the Command and an analysis and statement of the comparative qualifications as of January 6, 1976 of the petitioner and Mr. Snyder.

The January, 1976 USACARA report makes the following observations:

1. There was a minority group imbalance in the higher grades which was recognized by the defendant's EEO plan of Action.

2. The petitioner was contending in 1975 in his complaint of discrimination that he was "unofficially detailed to assume the duties of the Branch Chief (which later became a Team Chief)

and he was the unofficial Team Chief when the packaging element was reorganized from a Division to a Branch." He contended that he was not given proper credit for his experience.

3. The 1975 contested promotion came about as a result of interviews of the candidates by Mr. Mervin Edwards (white male) who was the selecting official.

4. A comparison of the petitioner's and Mr. Snyder's career appraisals for 1974 and 1975 reveals that the petitioner received outstanding ratings in six of seven elements and an above average in the rating in the seventh element, all at the GS-11 level, and that Mr. Snyder received an outstanding rating in six of seven elements and an above average in the seventh element, all at the GS-2032-09 level.

5. The petitioner was wrongfully evaluated in several important respects in that Mr. Snyder was rated higher than Mr. Emanuel in the area of experience as a team leader or supervisor.

6. The petitioner was improperly evaluated lower than Mr. Snyder by Mr. Mervin Edwards

in six different areas, namely, the ability to develop internal operative procedures; the ability to provide complete packaging support of procurement actions; the ability to anticipate, plan and direct completion of major projects; the ability to make authoriative decisions and commitments for the Command; the possession of skill in personnel management of policies and programs; and the ability to develop publications and develop new concepts of protection in handling aircraft and complex components.

7. "That Mr. Mervin E. Edwards did discriminate against Mr. Alston A. Emanuel, the complainant, because of his race by providing unfair and subjective evaluations of Mr. Emanuel's skills, knowledges, abilities, and personal characteristics, and utilized biased evaluations to select a White candidate who was not as well as qualified as the complainant."

In addition to the foregoing findings contained in the USACARA 1976 Report of Investigation, the Agency's EEO counselor conducted an investigation of the peti-

tioner's 1975 discrimination complaint and prepared a memorandum which set forth a detailed comparative analysis of the relative qualifications of the two individuals, including their education, self-development, awards and appraisals, and set out the comparisons of the two individuals.

The January, 1976 USACARA report recommended "that the complainant's allegation of discrimination because of his race be confirmed in writing to him. That he be promoted retroactively to the Packaging Specialist, GS-2032-12 position, JN 13,719, effective 09-14-75" and that the "promotion selection authority be withdrawn from Mr. Edwards for a period of one year."

U.S. Army General Johanssen, the then Commanding General of the Agency, accepted the USACARA report and the petitioner was promoted to the position Packaging

Specialist, GS-2032-12 retroactive to September 14, 1975.

As a result of the petitioner's promotion to the position of GS-12, a situation existed where both he and Mr. Snyder for a period of time worked for Mr. Edwards as GS-12's. Mr. Edwards chose to allow Mr. Snyder to work in the policy area until Mr. Snyder was surplused to AVRADCOM, a newly created agency.

On April 10, 1978, Mr. Edwards initiated a sustained superior performance award for John Snyder for the period September 25, 1976, through March 25, 1978. Mr. Snyder was not assigned to the same Command as Mr. Edwards during a substantial portion of this period, but since there was no one at AVRADCOM where Mr. Snyder worked who was a packaging specialist, he allegedly continued to provide supervision for Mr. Snyder. The sutained superior perforance award for Mr.

Snyder was approved by John W. Greenwell on behalf of Paul L. Mino, the Director of Materiel Management. According to selecting official Straeb, the sustained superior performance award was an important consideration in his selection decision. In its January, 1976 Report of Investigation, USACARA concluded "that Mr. John B. Greenwell discriminated against Mr. Alston A. Emanuel because of his race by failing to take cognizance of the Affirmative Action guidance while reviewing the selection action in which a GS-11 Black candidate with superior qualifications was bypassed in favor of a White candidate." Both Mr. Edwards and Mr. Greenwell are caucasian.

The Agency uses a system of preparing registers for available positions in the grades GS and above based upon the skills, knowledge, ability, and personal characteristics (known as SKAP), which are pre-

pared by the careerist.

Annually, the careerist is given an opportunity to update information relating to his SKAP and send such information to Washington, D.C. in order to be eligible for registers relating to promotions.

In December, 1979, Mr. Edwards indicated that he was retiring and steps were taken to fill his position by preparing the required requisitions. On February 13, 1980, the Agency forwarded a request to the Army Career Coordinator for a referral list of those individuals who would be eligible to fill Mr. Edwards' anticipated vacancy.

On February 13, 1980, Mr. Snyder did not have a SKAP on file which would have entitled him to be on the referral list which had been requested by the Agency on that date.

For reasons that Mr. Snyder could not

recall, the Agency's SKAP administrator could not recall, and for which there is no clear explanation in the record, on February 14, 1980, John Snyder completed his SKAP package, and on February 15, 1980, that package was reviewed by Mr. Kennedy, an acting supervisor (contrary to existing practice where regular supervisors reviewed such documents), commented on by Mr. Kennedy, reviewed and upgraded by the Director, then Colonel Michael J. Pepe.

The petitioner did not update his SKAP in 1979 because his next previous SKAP had been downgraded by Mr. Edwards and/or Mr. Greenwell and he had to grieve to get it raised to an acceptable level.

The SKAP ratings for Mr. Snyder in several key elements were upgraded by reviewer Colonel Pepe from "B" to "A." Class Agent Paige testified that in his capacity as the class agent for the black

male employees of TSARCOM he had reviewed SKAP ratings for numerous, if not all, of the black males at TSARCOM who were eligible to be in the SKAP program, and there was not a single instance where any reviewer had ever upgraded the ratings of a black employee from those given by the employee and the employee's immediate supervisor. (Employees and their immediate supervisors are limited to the grade of B in the rating process.)

Neither Mr. Snyder's acting supervisor (Mr. Kennedy) who reviewed his SKAP, nor the reviewer Colonel Pepe, had any expertise in the field of packaging. The petitioner was supervised by Mr. Edwards who was an admitted expert in packaging. The comments by Mr. Snyder's acting supervisor Kennedy that "Mr. Snyder is thoroughly knowledgeable in his chosen career field and is considered an expert in all matters pertaining to preserva-

tion, packing, packaging, handling, storage and transport ability for all aviation military hardware" is made without the benefit of any apparent expertise by Mr. Kennedy, or without any showing that Mr. Kennedy had a significant opportunity to observe Mr. Snyder's performance over a significant enough period to make the judgment he made.

During the period after the January, 1976 Report of Investigation by USACARA of the petitioner's EEO complaint, and the acceptance of the conclusions and recommendations by the Commanding General of TSARCOM of such USACARA Report, the petitioner participated in three job related training courses.

On February 26, 1976, the petitioner was given a certificate of achievement for effectuating a cost saving of $3,265,000.00. Although recommended, he was not given a monetary suggestion award

because Mr. Mervin Edwards contended that what he did was part of his job duties. Nor was he given a sustained superior performance award.

On January 4, 1977, the petitioner was given a certificate of achievement for effectuating an annual cost savings of $18,500.00 in connection with the performance of his duties.

Mr. Snyder did not participate in any training during the period from January, 1976, through May, 1980, nor did he effectuate any cost savings for which he received certificates during said period.

When Julius Crouch, the Agency's EEO officer, was questioned by the petitioner regarding his reasons for rejecting the 1981 USACARA Report involving petitioner's case, Crouch stated that he had been instructed to write a rejection letter.

Both USACARA Reports reveal that the Agency's action in not promoting the pe-

titioner on both occasions constituted a violation of its Affirmative Action Plan. The investigations also both found, and the Agency admitted, substantial under-representation of black males in GS and above positions.

REASONS FOR GRANTING THE WRIT

The disparate impact theory of discrimination arises from Title VII of the Civil Rights Act of 1964, as amended. This Court pointed out in Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971), that "the [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." Thus under the disparate impact theory, proof of discriminatory motive is not required. "But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." [emphasis in original]. Griggs, supra. 401 U.S. at 432.

Since the Griggs decision, differences have developed among and even within the various Circuits of the United States Courts of Appeals as to when the dispa-

rate impact analysis may be properly applied. It is universally accepted that objective employment practices which are facially neutral but impose a substantially disproportionate burden upon a minority group protected under Title VII may be challenged under the disparate impact theory. Griggs, supra. Teal v. State of Connecticut, 457 U.S. 440, 29 FEP Cases 1 (1982). Dothard v. Rawlinson, 433 U.S. 321, 15 FEP Cases 10 (1977).

Whether subjective employment practices which are neutral on their face but discriminatory in impact may be analyzed under the disparate impact mode is considerably less clear. Some Circuits have found that subjective employment practices may be attacked under the disparate impact framework, noting that this Court in Griggs asserted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing

mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." (Emphasis added). Regner v. Chicago, 789 F.2d 534 (7th Cir. 1986) (Disparate impact theory may be employed in challenging city library system's use of subjective criteria in evaluating candidates for promotion). Hill v. Seaboard Coast Line Railroad Company, 767 F.2d 771 (11th Cir. 1985 (Disparate impact theory may be used to challenge subjective elements of selection processes).

Other Circuits have held that disparate impact claims "may not be based on subjective evaluation and promotion procedures." See Order of Court below (Eighth Circuit), Appendix at page 9.[1/] Still

---

1/ Note that the Court below admits that the Circuits are split on the question and that its own decisions have been "less than clear" with respect to this issue.

other Circuits have ruled differently. Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (Subjective practice of detailing workers analyzed under disparate impact framework).

The most exhaustive analysis of the application of the disparate impact analysis to subjective employment practices is found in Antonio v. Wards Cove Packing Co., 810 F.2d 1477, 43 FEP Cases 130 (9th Cir. en banc 1987). (Footnote 4 of that decision contains a collection of cases from the various Circuits dealing with this issue.)

Given this tremendous gap between the manner in which disparate impact analysis is applied across the Circuits, it is essential that this Court provide clear direction as to when such analysis is appropriate, and specifically whether or not subjective employment practices may be examined under the theory, so that the

law may be uniformly applied throughout the United States. This is necessary not only for the sake of consistency, but also due to the fact that it will allow allegedly injured parties to better ascertain the grounds on which they may pursue a claim, thus saving private as well as judicial resources.

As noted in Footnote 2 of the instant case, the utilization of the disparate impact test to subjective supervisory decision making appears to be before this Court in Watson v. Fort Worth Bank & Trust, 798 F.2d 91 (5th Cir. 1986) cert. granted in part, 107 S.Ct. 3227 (1987). Appendix 19.

For the above reasons, petitioner respectfully prays that this Petition for Writ of Certiorari be granted.

Specific Practices of the Agency

Petitioner claims that respondent (the Agency) engaged in unlawful discrimination by maintaining a promotion policy based on the subjective decisions of a predominantly white supervisory staff, such policy which disproportionately impacts black males, a class protected under Title VII, by denying them a fair opportunity to be promoted based on their job-related capabilities.

The U.S. Army Civilian Appellate Review Agency (USACARA) originally investigated petitioner's complaints and found, among other things, that there was a substantial underrepresentation of black males in GS and above positions; this was admitted by the Agency. Another finding of USACARA in both of its Reports is the non-compliance by the Agency with its own Affirmative Action Plan. Coupling these findings with the recognition that it is

the supervisory employees in GS and above positions, where blacks are substantially underrepresented, who are empowered to make promotion decisions based on subjective criteria, a strong inference of illegal discrimination arises. The apparently haphazard manner in which these subjective factors are used strengthens that suggestion.

One practice which petitioner contends puts an undue burden on black candidates for promotion is the optional use of interviews. Lieutenant Colonel Straeb, who made the decision to choose Mr. Snyder over petitioner, conducted only "informational" interviews solely for the purpose of clearing up certain matters. He estimated that some 80% of supervisors did not use interviews or only used them in a very limited manner, as he did, while 20% used in-depth interviews. Surely this discretionary use of the interview pro-

cess is not called for by business necessity, but just as clear is the fact that this policy enables the interview to be used or not used according to how it will help bring about a desired outcome. In the instant case, for example, an in-depth interview would have allowed Lieutenant Colonel Straeb to more accurately compare the qualifications and abilities of the candidates, and he very likely would have come to a different conclusion, as USACARA did.

Another procedure which petitioner contends is used in a way that disproportionately impacts against black candidates for promotion is that of allowing selecting officials apparently unbounded discretion in determining which qualifications weigh heaviest in the selection. Lieutenant Colonel Straeb testified that he gave the SKAP ratings "considerable weight" and that Mr. Snyder's Sustained

Superior Performance (SSP) Award was significant. On the other hand, though he considered the respective levels of education and training in his choice, he did not consider education "to be as significant as some of the other elements," and felt the same way about training. Petitioner argues that by maintaining a policy of allowing supervisors complete discretion in deciding which qualifications to emphasize, a situation analogous to that in Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982) is likely, in which black candidates with superior education and training will be denied promotions because their selecting official weighs SKAP ratings more heavily, and blacks with higher SKAP ratings will not be chosen because education and training are emphasized in their cases.

In a disparate impact case it is the business necessity, rather than the in-

tent, of the employment practice which is in question. Petitioner argues that the Agency's promotion policy, which has been shown to have a disproportionate impact on blacks, is not required by business necessity and could be replaced, to the advantage of all parties, by one under which the selecting official was directed as to which aspects of the candidates' qualifications to weigh more heavily than others. This policy would eliminate the unlawful discrimination now being practiced against blacks at the Agency and insure that the Agency promoted the most able and qualified individual in each case. Petitioner emphatically feels that neither of these goals was met in the instant case.

Petitioner further objects to the manner in which awards are given out and then incorporated into the selection process. Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) set a precedent for examining

a combination of factors under the disparate treatment theory. In the instant case it was shown that black males received fewer awards than their caucasian counterparts. The awards which Lieutenant Colonel Straeb considered most significant, including the SSP Award given to Mr. Snyder, were initiated by the supervisors at their discretion. The confirmation of the award depended on a review panel determining that the selectee had indeed met the award criteria, but the significant point is that given two individuals who have both met all award criteria and have performed their jobs equally well, one may arbitrarily be chosen to receive an award while the other is not.

Petitioner feels strongly that his work was of a quality deserving an award, yet due to the policy requiring supervisory initiation of awards, he was denied one. This became significant in that it caused

his candidacy for promotion to compare less favorably with that of Mr. Snyder, who had received an SSP at the suggestion of Mr. Mervin Edwards, an official previously found guilty of discriminating against the petitioner, and the only man who could initiate an award on his behalf. Furthermore, given the wide discretion available to selecting officials with respect to what emphasis to put on candidates' qualifications, the smaller number of awards received by black males could have anywhere from a small negative to an overwhelming negative effect on the promotion chances of black males.

There is no business necessity to the largely discretionary initiation of awards. Black males would be much less likely to be placed under this discriminatory burden if more objective standards were adopted concerning eligibility for awards. Also, employees could be automatically reviewed

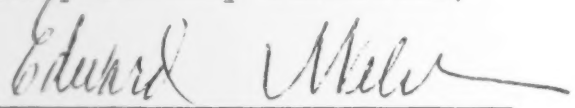
by a committee after they had worked a certain number of years, or in periodic intervals, so the refusal of one supervisor to nominate any subordinate for an award would not prevent a deserving individual from receiving one. Once again, these policy improvements would benefit not only black individuals but also the Agency as a whole, in that it would be rewarding and promoting the most capable and productive workers.

Having shown specific promotion practices of the Agency which are not required by business necessity and have an unlawful disparate impact on petitioner and other black males who work therein, and recalling that the Agency's own investigative body, USACARA, found that it was violating its Affirmative Action Plan, petitioner respectfully prays that this Court grant this Petition for Writ of Certiorari.

CONCLUSION

For these reasons, petitioner respectfully prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 2, 1987.

Respectfully submitted,



Edward L. Welch
Attorney for Alston A.
Emanuel, Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 86-1282

Alston A. Emanuel and Leon Paige,	*	
Appellants,	*	
v.	*	Appeal from the United
John O. Marsh, Jr., Secretary of the Army, in his official capacity; Department of the Army, HQ U.S. Army Troop Support and Aviation Materiel Readiness Command,	*	States District Court for the Eastern District of Missouri
Appellees.	*	

Submitted: February 13, 1987

Filed: September 2, 1987

Before HEANEY, McMILLIAN and FLAGG, Circuit Judges.

McMILLIAN, Circuit Judge

Alston A. Emanuel and Leon Paige appeal from a final judgment entered in the

District Court[1] for the Eastern District of Missouri in favor of John O. Marsh, Jr., Secretary of the Army (Army) in an action brought under 42 U.S.C. §2000e (Title VII). Emanuel v. Marsh, 628 F. Supp. 564 (E.D. Mo. 1986) (1986 Memorandum and Order). Emanuel alleged that he and other black male civilian employees at the United States Army Troop Support and Aviation Materiel Readiness Command (TSARCOM) were denied promotions or deterred from applying for promotions because of racial discrimination. During the pendency of the lawsuit, Paige was substituted as class representative with the permission of the district court. Paige appeals from the district court's order denying class certification. Emanuel v. Marsh, No. 85-55C(5) (E.D. Mo.

[1]The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

Jan. 9, 1985) (Certification Memorandum and Order).

For reversal, Emanuel argues that (1) the Army is estopped from litigating the issue of his qualifications relative to those of John Snyder, (2) the district court erred in refusing to apply a disparate impact analysis to his Title VII claim, and (3) the district court's findings are clearly erroneous. Paige argues that the district court abused its discretion in denying class certification. For the reasons discussed below, we affirm the judgment of the district court.

Background

Emanuel, a black male, was a civilian employee of the Department of the Army, employed as a packaging specialist at TSARCOM in St. Louis, Missouri. In 1975 he sought promotion to the position of Senior Staff Packaging Specialist at a GS-12 grade. The Army initially awarded

the position to Snyder, a white male, who was also a packaging specialist. Emanuel subsequently filed a complaint of racial discrimination with the United States Army Civilian Appellate Review Agency (USACARA), an independent agency with the responsibility for investigating civilian employees' complaints of employment discrimination by the Army. USACARA investigated and concluded that Mervin Edwards, Emanuel's supervisor, and John Greenwell, Edwards's supervisor, had discriminated against Emanuel because of his race in denying the promotion. The Army accepted USACARA's recommendation and awarded Emanuel a retroactive promotion with backpay. Emanuel continued to be supervised by Edwards after the promotion. Snyder retained his promotion and was transferred to another Army command in the St. Louis area where he continued to work in the packaging area.

Both Snyder and Emanuel did well in their careers after 1975. Emanuel completed several job-related training courses. He also received a certificate of achievement on February 20, 1976, for saving the federal government $3,265,000, and another certificate of achievement on January 4, 1977, for saving the government $18,500. Certificates of achievement are considered relatively minor awards.

In 1978 Snyder received a Sustained Superior Performance Award, which is considered a significant and prestigious award. He was nominated for the award by Edwards who had been, but was not then, his supervisor. Greenwell, Edwards's supervisor, approved the award.

In April 1980, Edwards, then Chief of the Packaging Branch, Distribution and Transportation Division, retired. After Edwards retired, Emanuel was temporarily

assigned for 30 days to the GS-13 position.

According to Army regulations, Edwards's position, a GS-13 packaging specialist, was to be filled from a list of qualified applicants supplied by the United States Army Civilian Personnel Center (CIVPERCEN) in Alexandria, Virginia. The list of qualified applicants supplied by CIVPERCEN was compiled under a career program system in which applicants submit statements of their qualifications and their interests together with ratings of their skills, knowledge, ability, and personal characteristics (SKAP). SKAP reports are usually updated annually in July, although an employee has the right to update the SKAP report at any time. Employees were also free to forego submitting an updated SKAP for one year and to continue to use the previous year's SKAP. In preparing a SKAP, the employee and his or her im-

mediate supervisor rate the employee's performance in key areas. Neither the employee nor the immediate supervisor may give a rating higher than a "B." A higher level supervisory officer, called a reviewing officer, may upgrade an employee's SKAP ratings to an "A." A panel convened by CIVPERCEN reviews the "SKAP packages." Applicants found to be "best qualified" for positions are automatically referred to the selecting officer for consideration for those positions.

Emanuel did not update his SKAP report in 1979, but requested that his 1978 SKAP report remain valid for the next year. He testified at trial that Edwards continued as his supervisor after the 1975 promotion controversy and he believed that Edwards would give him unfairly low ratings. Emanuel and Edwards had disagreed on Emanuel's 1978 SKAP evaluation. Emanuel filed a grievance concerning the 1978 SKAP

report; as a result his rating was raised to a higher level.

On the day the Army requested an applicant register from CIVPERCEN for the GS-13 supervisory position, Snyder did not have a SKAP report on file that would have permitted him to be included in the referral list. The next day, however, Snyder completed an updated SKAP report. Snyder could not recall at trial how he had learned about the vacancy in order to update his SKAP with such dispatch. Col. Michael Pepe, Snyder's reviewing officer, upgraded several of Snyder's ratings from "B" to "A" in key areas. Pepe testified that he upgraded the ratings because of Snyder's performance; Pepe did not know Emanuel, Edwards or Greenwell.

Lt. Col. Robert Straeb was the selecting official for the GS-13 supervisory position. He received an applicant

register which contained four names--Emanuel, Snyder, and two other white males. Straeb testified that he compared each candidate's SKAP ratings, awards, education, training and experience. Straeb testified that Snyder's SKAP ratings were significantly superior to those of Emanuel. Snyder had "As" in five categories; the rest were "Bs." Emanuel had ten "Bs" and one "C." Straeb also testified that he was impressed by the Sustained Superior Performance Award which Snyder had received. In the areas of training and education, Straeb found Snyder and Emanuel to be roughly equal. Both had received their college training in the 1930s and 1940s. Emanuel's training and education received in 1976 and 1977 were not considered by Straeb because Emanuel failed to update his Form 2303 to reflect this additional training and education. Straeb also testified that he gave more weight

to Snyder's past experience in packaging policy areas than to Emanuel's greater experience in supervision because of the requirements of the supervisory job. Straeb awarded the promotion to Snyder.

Emanuel filed a complaint of racial discrimination with USACARA. After an investigation, USACARA concluded that Emanuel had been discriminated against on the basis of his race. Specifically, USACARA concluded that Emanuel's qualifications had been improperly evaluated by the selecting official. The Army rejected this conclusion. Emanuel then filed this suit in federal district court seeking an order directing that he be promoted to the GS-13 supervisory position and awarded backpay.

Emanuel originally brought his action as a class action. When he retired and moved out of the St. Louis area, he withdrew as class representative and Paige,

another black male TSARCOM civilian employee, was substituted. Paige testified at the class certification hearing that TSARCOM employs a disproportionately small number of black males at the higher GS levels. He also testified that in his experience reviewing officers never upgrade the SKAP ratings for black male employees. He admitted that he did not know whether reviewing officers regularly upgraded SKAP scores for white employees. Paige presented TSARCOM equal employment opportunity statistics in support of his claim that there was discrimination on the basis of race at TSARCOM. Paige also argued that the subjective nature of the SKAP rating system, which is the basis for promotion decisions, enables white supervisors to discriminate against black employees in awarding promotions.

The district court denied class certification on the basis that the proposed

class failed to meet the "numerosity" requirement of Fed. R. Civ. 23. Certification Memorandum and Order at 2. The district court also dismissed Paige's individiual claim, finding that he had no "individual fully exhausted Title VII claim." Id. at 1. Paige appealed the denial of the class certification to this court, but the appeal was dismissed for lack of jurisdiction because there was no final order. Emanuel v. Marsh, 767 F.2d 929 (8th Cir. 1985). In the present appeal, Paige only challenges that part of the district court's order denying class certification.

On Emanuel's individual Title VII claim, the district court held that a prima facie case of racial discrimination had been established but concluded that the Army had rebutted the presumption of discrimination. 1986 Memorandum and Order, 628 F. Supp. at 570. The district court de-

termined that the Army had articulated convincing non-discriminatory reasons in support of its decision to promote Snyder and that the reasons offered by the Army were not a pretext for racial discrimination. The district court entered judgment in favor of the Army. Id. Emanuel appeals from the judgment against him on the Title VII claim.

Estoppel

Emanuel first contends that the Army should have been estopped from claiming that Snyder was better qualified in the areas of training, education and experience for the GS-13 supervisory position. Emanuel argues that the Army admitted in 1975 that he was better qualified than Snyder when it accepted USACARA's conclusion that Emanuel had been discriminated against on the basis of race in the competition against Snyder for the 1975 promotion. Emanuel argues that he relied

on this admission and did not submit updated SKAP reports.

In Heckler v. Community Health Services, 467 U.S. 51 (1984), the Supreme Court set out the requirements for estoppel:

> [T]he party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his [or her] position for the worse,' and that reliance must have been reasonable in that the party claiming the estoppel did not known nor should it have known that its adversary's conduct was misleading.

Id. at 59 (citation and footnotes omitted).

We hold that the elements of estoppel are not present in this case. First, there is no evidence of a factual misrepresentation. The Army's acceptance of USACARA's conclusion in 1975 that Emanuel was more qualified than Snyder at that time cannot reasonably be interpreted as a representation that Emanuel would be considered more qualified than Snyder for

all future promotions. Nor has Emanuel shown that he justifiably relied on the 1975 decision. Both Emanuel and Snyder continued to work as packaging specialists in the five intervening years and it is unreasonable to assume that their qualifications would remain static. Because we have concluded that the traditional elements of estoppel are not present, we need not consider the related issue of when the government may be estopped.

Disparate Impact v. Disparate Treatment Analysis

The district court employed a disparate treatment analysis to decide Emanuel's Title VII claim challenging the Army's subjective evaluation and promotion system. The district court held that the disparate impact analysis was inappropriate because Emanuel was not challenging a facially neutral objective employment test. 1986 Memorandum Order and Opinion,

628 F. Supp. at 568-69. The district court primarily relied, in making this determination, on this court's decision in McRae v. General Dynamics Corp., 774 F.2d 1174 (8th Cir. 1985).

Emanuel argues that his promotion claim should have been analyzed under the disparate impact theory, which does not require a showing of intentional discrimination. He relies on Paxton v. Union Nat'l Bank, 688 F.2d 552, 556 n.3 (8th Cir. 1982) (Paxton) (citations omitted) cert. denied, 460 U.S. 1083 (1983), where this court observed in a footnote:

> An argument can be made that the promotion class claims should have been decided under the discriminatory impact theory. [T]he plaintiffs proved that the racial composition of the bank's work force at most above-entry levels does not reflect the composition of available qualified persons in the relevant labor pool. The court could have concluded from this that the sum of the defendant's promotion methods, although not ad-

> ministered with a discriminatory intent, impacted more heavily on blacks in the bank's work force.

Emanuel argues that the Army's subjective promotional system is the facially neutral employment practice that implicates disparate impact analysis.

The Army responds that this court, in a case decided after Paxton, held that ab attack on an employer's system of subjective decision-making must be analyzed under the disparate treatment and not the disparate impact model. Talley v. United States Postal Service, 720 F.2d 505, 506 (8th Cir. 1983) (Talley), cert. denied, 466 U.S. 952 (1984). In Talley a black female employee claimed that the subjective decision-making by a primarily white supervisory force disproportionately affected blacks and females. The district court held in Talley that the application of disparate impact analysis was inappropriate. Id. at 507. This

court affirmed, relying on Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (Harris). In Harris this court held that a subjective decision-making system cannot, standing alone, form the basis for a discriminatory impact claim. Id. at 611.

We hold that the district court properly applied a disparate treatment analysis to Emanuel's claim that he had been discriminated against as a result of subjective evaluation and promotion procedures. This court has held in several earlier cases that a disparate impact claim may not be based on subjective evaluation and promotion procedures. Talley, 720 F.2d at 506-507; Harris, 651 F.2d at 610. See McIntosh v. Weinberger, 810 F.2d 1411, 1427 (8th Cir. 1987) (recognizing that the circuits are split and this court's holdings have been "less than clear" on whether disparate impact analysis may be

applied to subjective hiring and promotion practices).[2] Emanuel's reliance on Paxton is misplaced. Both the district court and this court analyzed the claim in Paxton under the disparate treatment theory. This court merely observed in a footnote that an argument could be made that the promotion class claim should have been decided under the disparate impact theory and cited a Tenth Circuit Case, Williams v. Colorado Springs, 641 F.2d 835, 839, 841 (10th Cir. 1981), in support of this argument. Paxton did not hold, however, that a disparate impact claim could be based on subjective employment procedures.

---

[2]Whether an employer's practice of committing employment decisions to the unchecked discretion of white supervisory staff is subject to the disparate impact test under Griggs v. Duke Power Co., 401 U.S. 424 (1971) is before the United States Supreme Court in Watson v. Forth Worth Bank & Trust, 798 F.2d 91 (5th Cir. 1986), cert. granted in part, 107 S.Ct. 3227 (1987).

Finding of No Discrimination

Emanuel next contends that the district court clearly erred in finding that he had not been discriminated against on the basis of his race. Emanuel's challenge to the district court's factual findings focuses on the alleged involvement of Edwards and Greenwell in "grooming" Snyder for the 1980 promotion. Emanuel argues that the evidence shows that Edwards and Greenwell gave preferential treatment to Snyder in his evaluations and in recommendations for awards so that he would appear more qualified. Emanuel asserts that he, on the other hand, was given less favorable treatment and was denied awards that he would have received had he been white. For example, Emanuel contends that Edwards recommended Snyder for a Sustained Superior Performance Award, but did not recommend Emanuel for a Sustained Superior Performance Award

or a monetary award even though he had saved the government over three million dollars. Emanuel also argues that Snyder was given "special accomodation" in updating his SKAP report in February 1980. According to Emanuel, Snyder's ratings were substantially raised by the reviewing officer and his updated SKAP report was submitted "in a hurry" and immediately after the supervisory vacancy was announced.

An appellate court may not set aside the factual findings of a district court unless the findings are clearly erroneous. Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), cert. denied, 106 S.Ct. 1285 (1986). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. at 1211-12, citing

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). "We may not duplicate the function of the district court by making our own determination of the facts and reversing if we believe we would have decided the case differently. . . ." 766 F.2d at 1212 (citation omitted). The Supreme Court has cautioned:

> [W]hen a trial judge's findings is based on his [or her] decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Id. at 1212, citing Anderson v. City of Bessemer City, 470 U.S. at 574.

There was conflicting evidence in the present case concerning the manner in which Emanuel's and Snyder's job performance was evaluated and the relative qualifications of the two men for promotion to the GS-13 supervisory position.

The district court could resolve this conflict only by choosing to believe some of the witnesses and not others. The district court concluded that Enanuel presented no credible evidence that Snyder's evaluation and promotion had been the result of racial discrimination. 1986 Memorandum Order and Opinion, 628 F. Supp. at 570. The district court found that the Army's witnesses, notably Edwards, were more credible. The district court stated that "it strains reasonableness for [Emanuel] to suggest that Edwards arranged for Snyder to receive an award that would help him obtain a promotion two years befor the position became available." Id. Although we would perhaps reach a contrary finding on the same evidence, under the applicable standard of review, we cannot say that the district court clearly erred in finding that the Army did not discriminate against Emanuel in denying the pro-

motion.

Emanuel next argues that the district court failed to properly consider evidence that the Army had disregarded its affirmative action plans in 1975 and 1980 when Snyder was selected for the promotion. This evidence was contained in the reports of USACARA that were introduced at trial. Emanuel relies on this court's decision in Craik v. Minnesota State University Board, 731 F.2d 465 (8th Cir. 1984) (Craik), where we held that the district court should have made a specific finding concerning non-compliance with an affirmative action plan. Id. at 472-73.

A district court is not required to make specific findings with respect to all the evidence presented to it. Craik, 731 F.2d at 472. Talley, 720 F.2d at 507. Craik held that in a case where compliance with an affirmative action plan is relevant to the question of dis-

criminatory intent, the district court must consider it as evidence. Id. at 472. Craik does not require, as Emanuel asserts, that the district court make findings in all instances concerning compliance with affirmative action plans. We hold that the district court did not err in failing to make specific findings of fact concerning the Army's compliance or non-compliance with its affirmative action plans.

Class Certification

Fed. R. Civ. P. 23(a)(1) requires the district court to determine, among other things, as a prerequisite to class certification that a class is "so numerous that joinder of all members is impractical." This court has not established any rigid rules regarding the necessary size of classes. Boyd v. Ozark Airlines, Inc., 568 F.2d 50, 54 (8th Cir. 1977). In determining whether the "numerosity" requirement is satisfied, the number of per-

sons in a proposed class, the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joinder is relevant. Paxton, 688 F.2d at 559-60. In Paxton, we held that 75 black employees in a promotion class carved out of a pool of 418 employee promotions satisfied the numerosity requirement. Id. at 560-61. In addition to the number of persons in the class, it was significant in Paxton that none of the black employees in the promotion class could, in an individual suit, obtain the broad-based declaratory and injunctive relief that the class sought. Id. at 561.

The district court in the present case denied certification of a class of black males employed at TSARCOM on the basis that the proposed class failed to satisfy the requirement of "numerosity."

The district court initially denied Paige's request to certify a promotion class consisting of all of the approximately 200 black male civilian employees who worked at TSARCOM. The district court held instead that black male civilian employees at TSARCOM who had been denied a promotion due to their race or had been deterred from seeking a promotion could constitute a class. Certification Memorandum and Opinion at 2.

In identifying the potential members of this class, the district court considered the administrative class pre-complaint which Paige had filed and the manner in which this complaint was resolved. In accordance with a Memorandum of Understanding executed to resolve the pre-complaint, the Army permitted black male civilian employees at TSARCOM to file a complaint concerning any alleged discrimination occurring within the preced-

ing two year period. Seventy-eight informal complaints were received. After extensive negotiations, 29 complaints were withdrawn; another 20 were settled without an admission of discrimination. Of the remaining 29 complaints, only 11 black male employees filed formal complaints. Based on this history, the district court concluded that 11 plaintiffs did not represent such a great number as to make joinder impracticable. Id. at 2.

A district court's decision to grant or deny class certification will be overturned only if there is an abuse of discretion. E.g., Jones v. Hutton, 763 F.2d 979, 981 (8th Cir.), vacated on other grounds, 106 S.Ct. 242 (1985). We hold that the district court did not abuse its discretion in holding that the class of potential plaintiffs did not meet the "numerosity" requirement.

Accordingly, the judgment of the district court is affirmed.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent because after examining the record and the exhibits, I am left with the firm conviction that the district court's finding that the defendants did not discriminate against Alston Emanuel is clearly erroneous.

On January 6, 1976, the U.S. Army Civilian Appellate Review Agency found:

> A. That Mr. Mervin E. Edwards did discriminate against Mr. Alston A. Emanuel, the complainant, because of his race by providing unfair and subjective evaluations of Mr. Emanuel's skills, knowledges, abilities, and personal characteristics, and utilized biased evaluations to select a White candidate [John W. Snyder] who was not as well qualified as the complainant.

Conclusion A, p. 10, Exhibit 12.

It recommended:

> A. That the complainant's allegation of discrimination because of his race be confirmed in writing to him. That he be promoted

> retroactively to the Packaging Specialist * * * position * * * effective 09-14-75.
>
> B. That promotion selection authority be withdrawn from Mr. Edwards for a period of one year. Further, all placement actions in the Materiel Management Directorate be reviewed personally by the EEO Officer and appropriate senior civilian personnel officials for a period of one year, to assure compliance with the EEO Program as it pertains to minority group members.
>
> C. That appropriate corrective action against the discriminating officials be considered as prescribed in CPR 751, Appendix A.

Recommendations, p. 13, Exhibit 12.

The Army did not appeal from this decision and it promoted Emanuel. Snyder, however, was permitted to retain the higher rating that had been given to him for reasons of race rather than merit. Both men continued to work at various jobs in the packaging division until the fall of 1980. At that time, another vacancy arose, Snyder and Emanuel made application for the higher position, and

again Snyder was selected.

Emanuel again filed a formal complaint of discrimination, and again the U.S. Army Civilian Appellate Review Agency carefully reviewed the evidence, and again found that Emanuel had been discriminated against because of his race, and that again the beneficiary had been Snyder. The Review Agency concluded:

> A. That Mr. Emanuel's qualifications were not accorded full consideration for the aggrieved position and, as a result, he was discriminated against because of his race in his nonselection for promotion to the position of Supervisory Packaging Specialist * * *. This conclusion is predicated on a comparative analysis of the overall qualifications of the complainant and Mr. Snyder which shows that of the five factors relied on in the selection action, Mr. Emanuel possessed superior experience, more job-related training and self-development and had completed a higher level of formal education than the selectee.

Conclusion A, p. 13, Exhibit 14.

The conclusion was based on its spe-

cific findings that Emanuel had greater occupational experience (Finding 2, page 11, Exhibit 14); that Emanuel had completed a higher level of formal education than Snyder (Finding 6, page 12, Exhibit 14); that Emanuel had a better record of job-related training and self-development than Snyder (Finding 7, page 12, Exhibit 14); and on a general finding:

> With respect to the qualifications of the selectee [Snyder] and Mr. Emanuel highlighted above, Mr. Emanuel's job-related achievements and accomplishments in experience, formal education and job-related training and self-development (3 or 60% of the factors (5) relied on in the selection action) projects his overall qualifications for the position to be superior to those of the selectee.

Finding 8, p. 12, Exhibit 14.

The Review Agency found that Snyder had higher SKAP ratings than Emanuel, but that these ratings accounted for only forty percent of the total score and were thus not as important as the factors

listed above in determining overall qualifications. More importantly, these ratings were largely derived from reports submitted by Edwards--the very person who had discriminated against Emanuel four years earlier.

As I read the district court's opinion, it gave little or not weight to the findings of the Review Agency. Instead, it relied heavily on Lieutenant Colonel Straeb's testimony that the principal reason for promoting Snyder was his superior SKAP ratings. In doing so, the district court ignored the fact that Snyder's SKAP ratings were higher than those of Emanuel because they originated with Edwards. (T. Vol. 2, p. 68) The district court specifically credited Edwards' testimony as being more credible than that of Emanuel. While credibility is for the district court, its confidence in Edwards was demonstrably misplaced.

We might have another case if Colonel Straeb had gone back into the record and thoroughly reviewed the earlier case of discrimination against Emanuel. Straeb perhaps could then have concluded that Snyder's SKAP ratings by Edwards were not tainted by a discriminatory evaluation. He did not do so. The following colloquy demonstrates that fact:

> Q So you knew before you made the selection that Mr. Emanuel had filed a discrimination complaint against the directorate involving Mr. Snyder? * * *
>
> A I was aware of that, yes.
>
> Q And you were aware that Mr. Emanuel had been awarded the job that Mr. Snyder had been awarded[?]
>
> A What he showed me proved that he was in fact a GS 12 on a certain date * * * and I then clarified that with the personnel division.
>
> * * * *
>
> Q * * *[Y]ou did go to personnel?
>
> A Yes. I--just on that particular point, just to verify that the date he was a GS 12 was in fact correct.

Q And personnel told you all about it, didn't they?

A No, they didn't.

Q * * * Did you also make a call to Mr. Greenwell and Mr. Edwards or anybody else about the discrimination[?]

A No.

Q Did you make an inquiry of the Director of TSARCOM, General whoever it was? Di you make an inquiry as to what he had done?

A No.

Q In terms of his findings?

A No.

Q You didn't do any of those things?

A No.

T. Vol. 2, pp. 74-75.

The only conclusion that I can draw from this failure is that Colonel Straeb, the appointing officer, was not interested in determining the basis of Emanuel's and Snyder's SKAP ratings which were claimed to be the most important element in Straeb's decision to award the job to

Snyder.

We should reverse outright and remand to the district court for a determination of damages.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.